BOARD OF ALIEN LABOR CERTIFICATION APPEALS
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

Date Issued: July 30, 1996

Case No.: 94-INA-619

In the Matter of:

BLOOMBERG, L.P.
Employer

On behalf of:

NORIYUKI ARAKI
Alien

Before: Huddleston, Vittone and Wood
Administrative Law Judges

JOHN VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review, pursuant to 20 C.F.R. §656.26 (1991), of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations (C.F.R.). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien

will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

An application for labor certification for the position of Editor of a bilingual financial periodical was filed by Employer, Bloomberg, L.P., on behalf of alien, Noriyuki Araki, on April 6, 1993 (AF 167-322). Minimum requirements for the job were a Bachelor's degree in Journalism and 1 year experience in the job offered or 1 year experience in the related field of Marketing, as well as fluency in written and oral Japanese (AF 167). Following the recruitment process, there were 8 U.S. applicants (AF 95-165). None were interviewed by the Employer.

The CO filed his Notice of Findings on April 20, 1994, questioning employer's rejection of applicant Kumiko Yokoyama Zelonky, whom the CO deemed qualified for the position (AF 90-94). Employer's rebuttal[1], filed May 3, 1994, denied that applicant Zelonky had met either the education or experience qualifications for the position (AF 37-89).

In the CO's Final Determination, dated July 28, 1994, labor certification was denied (AF 28-36). The Employer filed a request for Administrative Judicial Review and a brief in support (AF 1-27).

DISCUSSION

The determinative issue before this Board is whether Employer unlawfully rejected U.S. applicant KumikoYokoyama Zelonky for failure to meet the minimum education and experience requirements for the position of editor of a bilingual Japanese-English financial periodical.

The Employer stated on the Application for Labor Certification that the position required a Bachelor's degree in Journalism, and 12 months experience in either the job offered, or 12 months experience in the related occupation of marketing (in addition to a Japanese language requirement which all agree U.S. applicant Zelonky has met) (AF 167). Ms. Zelonky's resume

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[1] The CO states that the rebuttal, written by the attorney, cannot be considered because an attorney cannot give evidence. We find that the rebuttal consists of argument and not evidence and therefore, is acceptable.

reports an A.A. in Economics, and lists 34 months experience as editor-in-chief for a Japanese-English magazine, 33 months experience as a free-lance Japanese-English writer, and 12 months experience in a related marketing occupation of publicist, although some or all of her experience appears to be in part-time, rather than in full-time positions.

Section 656.21(b)(6) provides that if U.S. workers have applied for the job opportunity, an employer must document that the applicants were rejected solely for lawful, job related reasons. In general, an applicant is considered qualified for a job if he or she meets the minimum requirements specified for that job in the labor certification application. *United Parcel Service*, 90-INA-90 (Mar. 28, 1991). Section 656.24(b)(2)(ii) provides "[t]he Certifying Officer shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed." This Board has found that where the job requirements are not found to be unduly restrictive and an applicant does not meet the employer's stated requirements, the CO may not rely upon section 656.24(b)(2)(ii) to find the applicant nevertheless qualified. *Bronx Medical and Dental Clinic*, 90-INA-479 (Oct. 30, 1992) (*en banc*).

In this case, the CO did not challenge the Employer's requirement of a B.A. in Journalism. Nonetheless, the CO found in his Final Determination that Employer applied its educational and experience requirements so narrowly as to reject an otherwise qualified U.S. worker (AF 28-36). He stated that the 3 years of svp (specific vocational preparation) required for the position had been met by a combination of the applicant's education and experience. Id.

Employer argues in its brief that where the CO has not challenged a stated job requirement as being unduly restrictive, the Employer is entitled to disqualify applicants who do not possess such qualifications, and when a U.S. applicant does not possess an unchallenged minimum requirement, the CO bears the burden of proving that the applicant is nonetheless qualified. (AF 41-52). Employer contends that the CO has not carried that burden in this instance (id.).

Ms. Zelonky states on her resume that she had acquired an A.A. in Economics, which is a two year Associates degree. Clearly, she does not meet Employer's stated educational requirement of a B.A. in Journalism. She is, therefore, not qualified for the position under the standard enunciated in *United Parcel Service*, 90-INA-90 (Mar. 28, 1991). The CO admits that Ms. Zelonky did not meet the stated requirements, however, he challenged the failure of the Employer to interview Ms. Zelonky based a review of the combination of education and experience under section 656.24(b)(2)(ii). The Board has stated in *Bronx Medical and Dental Clinic*, 90-INA-479 (Oct. 30, 1992) (*en banc*) that the CO cannot after the fact, substitute his/her judgment for employer's requirements and then penalize the employer for having acted without regard to that judgment when reviewing applicants.

There have only been two cases in which a panel of the Board has upheld a denial based on a finding that the combination of education and experience demonstrated by the applicant clearly established that he/she was qualified for the job. In *Suma Fruit International USA, Inc.*,

91-INA-47 (Feb. 3, 1993), the employer rejected the applicant without an interview because he did not state on his resume that he had a B.S. in accounting; however, the applicant had stated that he had four years of college in accounting and had four years of experience that directly mirrored the duties for the position. The panel held that the employer should have investigated the applicant's credentials further because it appeared that he may meet the stated requirements of the employer. In *Quality Inn Rainbow Bridge at the Falls*, 93-INA-7 (Apr. 6, 1994), the employer required an Associate degree in Restaurant Management and three years experience in the job offered for the position of Manager, Food and Beverage/Executive Chef. The applicant had a degree in Political and Social Science, was a graduate of the Boston School of Cooking, was enrolled in a Master's program in Hospitality Management, had ten years of experience as an Executive Chef and had owned and managed two restaurants. The panel held that based on the applicant's impressive credentials for the offered job, he "should have been considered and interviewed rather than rejected out of hand because he lacked a specific two year degree in Restaurant Management." *Quality Inn Rainbow Bridge at the Falls*, 93-INA-7 (Apr. 6, 1994).

Suma Fruit is distinguishable from this case in that the applicant's resume indicated that he may have possessed the degree or an equivalent degree, therefore, the panel held that employer should have investigated his credentials further through an interview. In the case before us, the applicant clearly did not have the degree required or anything equivalent. *Quality Inn* can also be distinguished. The applicant in that case possessed a number of relevant educational experiences and had a substantial amount of experience in the required field. That is not the case here. Ms. Zelonky had acquired only an Associates degree in an unrelated field and did not have a substantial amount of relevant experience. Ms. Zelonky's resume states that she was Editor in Chief of a Japanese/English magazine called *The Real Estate* from July of 1989 until May of 1992 although her cover letter states that in her employment with this magazine she "was ultimately promoted to the position of Editor-In-Chief." (AF 117). Other experience Ms. Zelonky has acquired that may be considered "marketing" was that of Publicist for a subsidiary of a Japanese television company (id.). Both of these positions appear to be part-time. Therefore, the applicant in this case did not have any relevant education and does not possess what this panel would consider to be <u>substantial</u> relevant experience as in *Quality Inn*.

Accordingly, based on the analysis above, we disagree with the CO's determination that the Employer's actions do not reflect a good faith effort to recruit. Accordingly, the CO's denial of labor certification should be reversed.

ORDER

The Certifying officer's denial of labor certification is hereby **REVERSED** and the CO is ordered to **GRANT** certification.

For the Panel:

JOHN M. VITTONE
Chief Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such Review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002.

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.